



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 2, 1998

Mr. D. Craig Wood  
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San Antonio, Texas 78212-3166

OR98-0003

Dear Mr. Wood:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 110436 and 111668.

The Comal Independent School District (the "district"), which you represent, received two requests for information about a teacher. One of the requests was from the State Board for Educator Certification (the "board") and the other request was from an attorney for the Floresville Independent School District ("Floresville"). The district has already provided both the board and Floresville with most of the documents requested.<sup>1</sup> Thus, our review is limited to Exhibits C, D, and E, which contain documents and a tape recording that have not been provided to the requesting governmental agencies.<sup>2</sup> You assert that Exhibits C and E are excepted from disclosure pursuant to section 552.101 and that Exhibit D is protected from disclosure under section 552.114 of the Government Code.

**EXHIBITS C and E**

You assert that the information in Exhibits C and E is protected from disclosure under common-law privacy as protected under section 552.101 of the Government Code. We note initially that the district in this situation has the discretion to release, to the requesting governmental bodies, information protected by common-law privacy. *See* Open Records Decision No. 516 (1989) at 4 (information may be transferred between governmental bodies without destroying confidential character of information). Release to these requesting entities would not be a public release of private information. Gov't Code

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<sup>1</sup>Some of the transferred information is confidential and may not be publicly disclosed.

<sup>2</sup>We note that you submitted duplicate exhibits in connection with each request. Specifically, you submitted duplicate copies of the information labeled, respectively, as Exhibits C, D, and E.

§§ 552.007 (prohibiting selective disclosure of information), .352 (providing criminal penalties for public release of confidential information). However, neither the Open Records Act nor any other statutory authority *requires* the district to transfer such private information to the requesting governmental bodies. Open Records Decision No. 516 (1989) at 3 (requesting governmental entity had statutory authority to obtain information on absent parents). We will address public access to information made confidential under common-law privacy.

The test to determine whether information is private and excepted from disclosure under common-law privacy is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). Both exhibits C and E contain information about the teacher's family and family relationships that is intimate and embarrassing and of no legitimate interest to the public. We have marked the written information that is protected under common-law privacy. This same type of information on the tape recording is similarly protected.<sup>3</sup>

You also cite to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* at 525.

The court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity. However, the court held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Id.* at 525. We believe that there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and in the details of the complaint, regardless of the outcome of the investigation. See Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 423 (1984) at 2 (scope of public employee privacy is generally narrow). Pursuant to the court's decision in *Ellen*, we agree that you must withhold from public disclosure the names of the alleged victims and witnesses and any other identifying information concerning them. We have marked the information in Exhibit

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<sup>3</sup>We note that sections 552.024 and 552.117 of the Government Code provide that a public employee may opt to keep information private that reveals whether the individual has family members. However, since in this situation you do not raise these provisions at this time, we do not address this issue

C that is protected. To the extent that any such identifying information concerning the victims and witnesses is revealed in Exhibit E, we agree that it also must be withheld from public disclosure.

#### **EXHIBIT D**

You assert that section 552.114 of the Government Code excepts from disclosure information in Exhibit D. Section 552.114 protects from disclosure student records at an educational institution funded completely or in part by state revenue. The term "student record" in section 552.114 has been generally construed to be the equivalent of "education record." *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990), 477 (1987), 332 (1982). Section 552.026 excepts from disclosure education records unless released in conformity with the Family Educational Rights and Privacy Act ("FERPA"), title 20 of the United States Code, section 1232g. "Education records" are records that (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986).

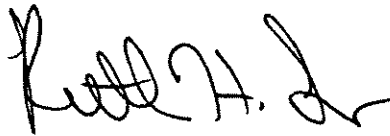
We note initially that in Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 and FERPA, without the necessity of requesting an attorney general decision as to that exception. However, you have asked this office about release of records under section 552.114 and FERPA. Thus, we will address your arguments concerning release of the records at issue.

FERPA does not prohibit release of education records to "accrediting organizations in order to carry out their accrediting functions." 20 U.S.C. § 1232g(b)(1)(G). It appears that the board is seeking information from the district as part of the board's accrediting function. Thus, FERPA allows the district the discretion to provide the board with education records if such release is so that the board can carry out its accrediting functions. We note also that FERPA also allows for release of education records to authorized representatives of state and local educational authorities when a release is for the purpose of complying with federal requirements or if it is in connection with an evaluation of federal or state education programs. 34 CFR §§ 99.31(a)(3), 99.35(a). However, you do not indicate that Floresville is seeking education records for such purposes.

We agree that the student names, which you have redacted from the typed documents and from the note that was handwritten by the teacher, are protected from public release under FERPA. The redacted information may not be disclosed to Floresville. The district may, but is not required, to release the redacted information to the board. The remaining portions of these de-identified documents must be disclosed to the requesting entities. As for the handwritten notes that were written by a student, these also must be withheld from release to Floresville in their entirety because the handwriting style can be identifying as to the student. Open Records Decision No. 224 (1979). Again, the district has discretion as to whether to release the handwritten notes to the board.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/alg

Ref: ID#s 10436, 111668

Enclosures: Submitted documents

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